

AMENDED IN ASSEMBLY AUGUST 21, 2013

AMENDED IN SENATE MAY 28, 2013

AMENDED IN SENATE APRIL 2, 2013

SENATE BILL

No. 145

Introduced by Senator Pavley

(Principal coauthor: Assembly Member Gorell)

(Coauthors: Senators Anderson and Knight)

January 31, 2013

An act to amend Section 311.11 of, and to repeal and add Section 288.2 of, the Penal Code, relating to sex offenders.

LEGISLATIVE COUNSEL'S DIGEST

SB 145, as amended, Pavley. Sex offenders: child pornography.

(1) Existing law makes it a crime for a person, with knowledge that another person is a minor, to knowingly distribute, send, cause to be sent, exhibit, or offer to distribute or exhibit by electronic mail or the Internet any harmful matter, as defined, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or the minor, and with the intent or the purpose of seducing a minor.

This bill would instead make it a misdemeanor or a felony for every person who knows, should have known, or believes that another person is a minor to distribute or exhibit harmful matter, as defined, depicting a minor or minors engaging in sexual conduct, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of engaging in sexual intercourse, sodomy, oral copulation, or with the intent that either person touch an intimate body part of the other. The

bill would make a violation of these provisions punishable by imprisonment in a county jail not exceeding one year, or in the state prison for ~~2, 4, or 6~~ 3, or 5 years.

If the matter used was harmful matter, as defined, but does not include a depiction of a minor engaged in sexual conduct, ~~or if the matter used was not harmful matter, but did include a depiction of a minor engaged in sexual conduct,~~ the bill would make a violation of these provisions punishable by imprisonment in a county jail not exceeding one year, or in the state prison for ~~2, 3, or 4~~ 16 months, 2, or 3 years.

~~If the person used the matter with the intent to engage in sexual conduct with a minor that does not involve sexual intercourse, sodomy, oral copulation, or the touching of an intimate body part of the other person, the bill would make a violation of these provisions punishable by imprisonment in a county jail not exceeding one year, or in the state prison for 16 months, or 2 or 3 years.~~

By increasing the punishment for a crime, this bill would impose a state-mandated local program.

(2) Existing law makes it a felony, punishable by imprisonment in the state prison for 16 months, or 2 or 3 years, or in a county jail for up to one year, or by a fine not exceeding \$2,500, or by both the fine and imprisonment, to knowingly possess or control child pornography, as specified.

The bill would make it either a felony, punishable by imprisonment in the state prison for ~~2, 4, or 6~~ 16 months, 2, or 5 years, or a misdemeanor, punishable by imprisonment in a county jail for up to one year, or by a fine not exceeding \$2,500, or by both the fine and imprisonment, if the person knowingly possesses or controls child pornography, as specified, and the matter contains more than 600 images, as defined, at least 10 of which are images of prepubescent minors or minors under 12 years of age; or the matter portrays sexual sadism or sexual masochism involving a minor, as defined.

This bill would make other technical, nonsubstantive, and conforming changes.

Existing law, Proposition 83, as approved by the voters at the November 7, 2006, statewide general election, amended Section 311.11 of the Penal Code. The act authorizes the Legislature to amend its provisions to expand the scope of its application or to increase the punishments or penalties established by the act by a statute passed by a majority vote of each house thereof.

Because the bill would increase punishments provided in the act, the bill may be passed by a majority vote of each house of the Legislature.

Because a violation of the provisions would be a crime, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 288.2 of the Penal Code is repealed.
- 2 SEC. 2. Section 288.2 is added to the Penal Code, to read:
- 3 288.2. (a) (1) Every person who knows, should have known,
- 4 or believes that another person is a minor, and who knowingly
- 5 distributes, sends, causes to be sent, exhibits, or offers to distribute
- 6 or exhibit by any means, including by physical delivery, telephone,
- 7 electronic communication, or in person, any harmful matter that
- 8 depicts a minor or minors engaging in sexual conduct, to the other
- 9 person with the intent of arousing, appealing to, or gratifying the
- 10 lust or passions or sexual desires of that person or of the minor,
- 11 and with the intent or for the purposes of engaging in sexual
- 12 intercourse, sodomy, or oral copulation with the other person, or
- 13 with the intent that either person touch an intimate body part of
- 14 the other, is guilty of a misdemeanor, punishable by imprisonment
- 15 in a county jail not exceeding one year, or is guilty of a felony,
- 16 punishable by imprisonment in the state prison for two, ~~four, or~~
- 17 ~~six~~ *three, or five* years.
- 18 (2) If the matter used by the person is harmful matter but does
- 19 not include a depiction or depictions of a minor or minors engaged
- 20 in sexual conduct, the offense is punishable by imprisonment in a
- 21 county jail not exceeding one year, or by imprisonment in the state
- 22 prison for ~~two, three, or four~~ *16 months, two, or three* years.
- 23 ~~(3) If the matter used by the person includes a depiction or~~
- 24 ~~depictions of a minor or minors engaged in sexual conduct, but is~~
- 25 ~~not harmful matter, the offense is punishable by imprisonment in~~

1 a county jail not exceeding one year, or by imprisonment in the
2 state prison for two, three, or four years.

3 ~~(4) If the matter used by the person is either harmful matter, or~~
4 ~~includes a depiction or depictions of a minor or minors engaged~~
5 ~~in sexual conduct, or both, and the person intends to engage in~~
6 ~~sexual conduct with a minor, or to induce a minor to engage in~~
7 ~~sexual conduct, that does not involve sexual intercourse, sodomy,~~
8 ~~or oral copulation with the other person, and does not involve~~
9 ~~either person touching an intimate body part of the other, the~~
10 ~~offense is punishable by imprisonment in a county jail not~~
11 ~~exceeding one year, or by imprisonment in the state prison for 16~~
12 ~~months, or two or three years.~~

13 ~~(5)~~
14 (3) For purposes of this subdivision, ~~each~~ *the* offense described
15 in ~~paragraphs (2) to (4), inclusive, paragraph (2)~~ shall include all
16 ~~of the~~ elements described in paragraph (1), except as to the element
17 ~~or elements~~ modified in each subsequent paragraph (2).

18 (b) For purposes of this section, “sexual conduct” has the same
19 meaning as defined in subdivision (d) of Section 311.4.

20 (c) For purposes of this section, “harmful matter” has the same
21 meaning as defined in Section 313.

22 (d) For purposes of this section, an intimate body part includes
23 the sexual organ, anus, groin, or buttocks of any person, or the
24 breasts of a female.

25 (e) Prosecution under this section shall not preclude prosecution
26 under any other provision of law.

27 (f) It shall be a defense to any prosecution under this section
28 that a parent or guardian committed the act charged in aid of
29 legitimate sex education.

30 (g) It shall be a defense in any prosecution under this section
31 that the act charged was committed in aid of legitimate scientific
32 or educational purposes.

33 (h) It does not constitute a violation of this section for a
34 telephone corporation, as defined in Section 234 of the Public
35 Utilities Code, a cable television company franchised pursuant to
36 Section 53066 of the Government Code, or any of its affiliates, an
37 Internet service provider, or commercial online service provider,
38 to carry, broadcast, or transmit messages described in this section
39 or perform related activities in providing telephone, cable
40 television, Internet, or commercial online services.

1 SEC. 3. Section 311.11 of the Penal Code is amended to read:

2 311.11. (a) Every person who knowingly possesses or controls
3 any matter, representation of information, data, or image, including,
4 but not limited to, any film, filmstrip, photograph, negative, slide,
5 photocopy, videotape, video laser disc, computer hardware,
6 computer software, computer floppy disc, data storage media,
7 CD-ROM, or computer-generated equipment or any other
8 computer-generated image that contains or incorporates in any
9 manner, any film or filmstrip, the production of which involves
10 the use of a person under 18 years of age, knowing that the matter
11 depicts a person under 18 years of age personally engaging in or
12 simulating sexual conduct, as defined in subdivision (d) of Section
13 311.4, is guilty of a felony and shall be punished by imprisonment
14 in the state prison, or a county jail for up to one year, or by a fine
15 not exceeding two thousand five hundred dollars (\$2,500), or by
16 both the fine and imprisonment.

17 (b) Every person who commits a violation of subdivision (a),
18 and who has been previously convicted of a violation of this
19 section, an offense requiring registration under the Sex Offender
20 Registration Act, or an attempt to commit any of the
21 above-mentioned offenses, is guilty of a felony and shall be
22 punished by imprisonment in the state prison for two, four, or six
23 years.

24 (c) Each person who commits a violation of subdivision (a)
25 shall be punished by imprisonment in the state prison for ~~two, four,~~
26 ~~or six~~ *16 months, two, or five* years, or shall be punished by
27 imprisonment in a county jail for up to one year, or by a fine not
28 exceeding two thousand five hundred dollars (\$2,500), or by both
29 the fine and imprisonment, if one of the following factors exists:

30 (1) The matter contains more than 600 images that violate
31 subdivision (a), and the matter contains 10 or more images
32 involving a prepubescent minor or a minor who has not attained
33 12 years of age.

34 (2) The matter portrays sexual sadism or sexual masochism
35 involving a person under 18 years of age. For purposes of this
36 section, “sexual sadism” means the intentional infliction of pain
37 for purposes of sexual gratification or stimulation. For purposes
38 of this section, “sexual masochism” means intentionally
39 experiencing pain for purposes of sexual gratification or
40 stimulation.

1 (d) It is not necessary to prove that the matter is obscene in order
2 to establish a violation of this section.

3 (e) This section does not apply to drawings, figurines, statues,
4 or any film rated by the Motion Picture Association of America,
5 nor does it apply to live or recorded telephone messages when
6 transmitted, disseminated, or distributed as part of a commercial
7 transaction.

8 (f) For purposes of determining the number of images under
9 paragraph (1) of subdivision (c), the following shall apply:

10 (1) Each photograph, picture, computer, or computer-generated
11 image, or any similar visual depiction shall be considered to be
12 one image.

13 (2) Each video, video-clip, movie, or similar visual depiction
14 shall be considered to have ~~75~~ 50 images.

15 SEC. 4. No reimbursement is required by this act pursuant to
16 Section 6 of Article XIII B of the California Constitution because
17 the only costs that may be incurred by a local agency or school
18 district will be incurred because this act creates a new crime or
19 infraction, eliminates a crime or infraction, or changes the penalty
20 for a crime or infraction, within the meaning of Section 17556 of
21 the Government Code, or changes the definition of a crime within
22 the meaning of Section 6 of Article XIII B of the California
23 Constitution.